Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-292

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,
Petitioners,

—against—

DIETRICH MEYERHOFER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, L. C. Swick and M. M. Jennings, Jr., request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 10, 1974.*

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* Those parties also aligned with petitioners in the court of appeals are Sitomer, Sitomer & Porges, Alvin L. Sitomer, Stephan J. Sitomer and Robert E. Porges. Faulkner, Dawkins & Sullivan Securities Corp. was named as a defendant in the district court, but did not participate in the proceedings before the court of appeals. The full list of respondents herein is as follows: Dietrich Meyerhofer and Herbert Federman on behalf of themselves and an alleged class of all other purchasers of the common stock of Empire similarly situated; the law firm of Bernson, Hoeniger, Freitag & Abbey, attorneys for plaintiffs; and Stuart Charles Goldberg, intervenor-appellant in the court of appeals. The Securities and Exchange Commission appeared as *amicus curiae* in the court of appeals.

The Opinions Below

The court of appeals reversed the order of the district court in part, affirmed it in part, and dismissed petitioners' cross-appeal. The decision of the court of appeals is reported at 497 F.2d 1190 (2nd Cir. 1974) and appears in Appendix B hereto. The district court's opinion, rendered on August 23, 1973, has not been officially reported; it appears in Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 10, 1974. Thereafter petitioners filed a timely petition for rehearing and rehearing *en banc*, which was denied on August 21, 1974. This petition was filed within 90 days of such denial. This Court's jurisdiction to review the judgment below is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In a securities class action pending in a federal court, may an attorney named as a co-defendant with his former client disclose to plaintiffs' attorneys confidences and secrets of his former client and agree to testify against his former client in order to induce plaintiffs' attorneys to drop him as a defendant?

May such disclosures be made by the defendant attorney, and accepted by the attorneys for the class, in secret, with knowledge of the prior attorney-client relationship, without any attempt to notify the former client, without the former client's knowledge or consent and without the knowledge, permission or supervision of the district court?

Under such circumstances, may plaintiffs and their attorneys be permitted to continue to prosecute the claims of the alleged class against the former client without compromising the fairness, and appearance of fairness, of federal court proceedings?

Ethical Provisions Involved

The United States District Court for the Southern District of New York has embodied into its rules the American Bar Association's Code of Professional Responsibility (see General Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rules 3(a) and 5(f)). The Code has been accepted by the Bench and Bar as setting forth generally recognized standards of professional conduct, and is enforceable by the courts by virtue of their supervisory powers. The pertinent provisions of the Code of Professional Responsibility are set forth in Appendix G hereto.

Statement of the Case

In May of 1972 Empire, a Nebraska insurance company, made a public offering of 500,000 shares of its common stock.* In connection with this offering the New York City law firm of Sitomer, Sitomer and Porges acted as its attorneys. Stuart Charles Goldberg was a "limited partner" of the Sitomer firm (Appendix A, p. 2a).**

Goldberg performed substantial legal work on the Empire offering, amounting to 200 hours or more (A.41, 148).** He reviewed Empire's corporate minute books

* The seven individual petitioners are officers and or directors of Empire.

** References to the appendices to this petition are preceded by the word "Appendix." References preceded by "A." are to the Appendix filed in the court of appeals.

and other Empire papers in order to prepare spread sheets concerning Empire's prior offerings (Goldberg January 26 Sealed Affid., ¶32). He was present at meetings and privy to confidential discussions among members of the Sitomer firm concerning Empire and its representation (Goldberg January 26 Sealed Affid., ¶¶ 33, 66-68, 70-76). He also performed legal research concerning the extent to which the compensation to be paid by Empire to the Sitomer firm was required to be disclosed in Empire's registration statement (A. 148).

On Saturday, January 20, 1973, Goldberg, without the knowledge of Empire or of the other members of the Sitomer firm, searched through the firm's files relating to Empire. He made copies of various documents from these files (Goldberg January 26 Sealed Affid., ¶65). Two days later, on January 22, 1973, again without Empire's knowledge, Goldberg appeared at the offices of the SEC in Washington and discussed with staff members "the activities of the [Sitomer] firm and its relationship to its clients, namely those which had filed registration statements with the Commission" (Goldberg January 26 Sealed Affid., ¶2). Empire was one of those clients. Goldberg furnished to the SEC's staff a thirty-page affidavit and nineteen exhibits relating in substantial part to Empire and including copies of documents removed from the Sitomer firm's Empire files (Goldberg January 26 Sealed Affid., ¶ 2). Based on Goldberg's disclosures the SEC commenced a private investigation.

At the end of April of 1973, Empire's stockholders received the company's annual report for 1972, which included the statement that the company had been advised by counsel that it was not then possible to determine whether, or to what extent, the company might incur lia-

bility by reason of the fact that the 1972 Empire registration statement had not disclosed certain aspects of the compensation arrangements between the company and the Sitomer firm (A. 128, 165).

On May 2, 1973, within days of the dissemination of the annual report, plaintiffs filed the original complaint in this action (A. 2, 7). It alleged claims under the Securities Act of 1933, the Securities Exchange Act of 1934 and common law on behalf of a purported class in excess of 5,000 members. The claims related to the failure of Empire's registration statement to disclose certain fees paid to the Sitomer firm (A. 112, 115). The fourteen defendants named in the original complaint included Empire, seven of its officers and directors, the Sitomer firm, the firm's partners (including Goldberg) and the managing underwriter on the Empire offering.

On May 3, 1973, having learned that Goldberg was no longer with the Sitomer firm, one of plaintiff's attorneys, Arthur Abbey, telephoned Goldberg at his home and informed him that he had been named as a defendant in this action and that plaintiffs wished to serve him with process (A. 90, 98). Goldberg asked Abbey to summarize the complaint for him, which he did.

According to Goldberg, Abbey took the initiative by stating that since Empire had already disclosed its compensation arrangements with the Sitomer firm in its annual report, it would "be proper for [Goldberg] to discuss [his] Empire involvement with him" (A. 100). A forty-five minute conversation ensued in which Goldberg discussed with Abbey the facts and circumstances surrounding his involvement. Abbey also requested a copy of Goldberg's SEC affidavit and a meeting with him to "go into the facts in greater detail than was possible in a telephone conversa-

tion" (A. 101-102). Also, Goldberg's recollection was that it was Abbey's suggestion to furnish to Goldberg a copy of the complaint without the signature page to prevent a technically sufficient service, provided Goldberg would agree to accept service at any time in the future (A. 102). According to Abbey, Goldberg volunteered, without Abbey's solicitation, the facts as he knew them and requested a copy of the complaint with the last page removed, on the understanding that this would not constitute service of process (A. 90-91).

Late in the afternoon of May 3, 1973, Abbey and Goldberg met and talked in Goldberg's car in front of Abbey's office building (A. 91, 103). While in the car, Abbey turned over a copy of the complaint, absent the signature page, and Goldberg gave him a copy of his personal resume and copies of two books he had authored (A. 103). Abbey's affidavit states that this discussion lasted "some time" (A. 91). In response to Goldberg's assurances of his innocence, Abbey says he offered to read Goldberg's SEC affidavit and told Goldberg that if he and his partner, Berthold Hoeniger, concluded that plaintiffs and their class had no claim against Goldberg, they would move to drop him as a defendant (A. 91-92). Abbey and Goldberg arranged another meeting for Monday, May 7, 1973 (A. 92).*

On May 7, 1973 Goldberg met plaintiff's counsel at their offices. After an initial discussion and then a joint telephone conversation with a staff attorney at the SEC, Goldberg turned over to plaintiffs' counsel the thirty-page affidavit, with exhibits, which he had previously given to the SEC (A. 79, 93-94, 104-105). Plaintiffs' counsel read the affidavit during the meeting and then discussed the

* The record indicates that plaintiffs' counsel also met with Goldberg on May 4, 1973 (A. 34), but no details of this meeting are found in the record.

matter with Goldberg in greater detail (A. 94, 106). The record does not contain any account of the specifics of that discussion. It does show, however, that the May 4th meeting and the meeting on May 7th lasted *five hours or more* (A. 34).

At no time prior to or during these meetings did either Goldberg or plaintiffs' counsel notify Goldberg's former client, Empire, of what was transpiring or what information concerning Empire Goldberg was furnishing to plaintiffs' counsel. So far as the record shows, while a member of the SEC's staff was asked to consent to the delivery of Goldberg's affidavit to plaintiffs' attorneys, notifying Goldberg's former client or requesting its consent or presence at any meeting was not even discussed. Nor was the district court notified or asked to supervise or determine the propriety of the disclosures being made.

On May 11, 1973, four days following the meetings with Goldberg, plaintiffs moved to drop him as a defendant in the action. Plaintiffs' counsel explained the reasons for seeking to drop Goldberg as follows:

> "Immediately upon learning of the institution of this action, *Mr. Goldberg asked to meet with us in order to give us all facts within his possession*, and he did meet with us for a total of five hours or more on Friday, May 4 and Monday, May 7, 1973. In the course of the second meeting Mr. Goldberg also turned over to us a 30 page affidavit. . . ." (Emphasis added) (A. 34).
>
> "Mr. Goldberg and his attorney, Burton H. Finkelstein, Esq. of Messrs. Phillips, Nizer, Benjamin, Krim & Ballon, have already cooperated fully with us to the ultimate benefit of the class of defrauded stockholders which we represent; and *we have no doubt that this cooperation will continue until final resolution of this action*" (Emphasis added) (A. 35).

In addition, in a letter to the district court, dated May 29, 1973, plaintiffs' attorneys stated that they wished to have Goldberg dropped as a defendant because ". . . it is in our clients' interest to have Mr. Goldberg as a neutral and disinterested witness, rather than as an adversary one" (A.58).

Plaintiffs never attempted to take Goldberg's deposition prior to moving to drop him as a defendant. However, they followed a different course with respect to one of the other defendants, Faulkner, Dawkins & Sullivan Securities Corp., the managing underwriter on the Empire offering. They took Faulkner's deposition, on notice to all parties, on June 25, 26, and July 3, 1973 (A.4). Subsequently, when Faulkner moved to have the complaint dismissed as against it and to be dropped as a defendant (Faulkner Notice of Motion, filed August 9, 1973), plaintiffs responded by consenting to the granting of such an order for the reason that they had established, after a thorough document discovery and extensive depositions (at which all parties were represented and cross-examined), that it would be impossible to prove plaintiffs' claim against Faulkner (Hoeniger Affid., August 9, 1973, pp. 1-2). No justification has been established as to why Goldberg's disclosures were taken secretly, while Faulkner's knowledge was elicited on the record and subject to the district court's supervision.

On June 4, 1973, while the motion to drop Goldberg as a defendant was still pending, plaintiffs served an amended complaint. The amended complaint restated the claims asserted in the original complaint and elaborated upon various factual allegations. While the theory of the action did not change (i.e., that Empire's registration statement failed to disclose the compensation agreement between Empire and the Sitomer firm which allegedly constituted a

finder's fee rather than a fee for legal services), the amendments confirm that plaintiffs obtained from Goldberg detailed evidence against his former client which they deemed sufficiently important to justify an amended pleading (Compare, e.g., A. 9, 10, 21 with the Amended Complaint, ¶¶ 4, 5 and Goldberg January 26 Sealed Affid., ¶¶ 38, 39, 55, 58).

On June 7, 1973 Empire moved for a dismissal of the action without prejudice and related relief, pursuant to Canons 4 and 9 of the Code of Professional Responsibility, applicable Disciplinary Rules and Ethical Considerations and the supervisory power of the district court. Although plaintiffs contended that their decision to drop Goldberg as a defendant had been an "arm's length one" (A. 95), Empire's position was that the facts of record required the disqualification of plaintiffs' attorneys and the other relief requested by it, whether or not actual misconduct occurred, in order to avoid prejudice to Empire's rights with respect to ethical obligations owed to it by its former attorney and to foreclose, at the very least, the appearance of impropriety (Empire Memorandum of Law, dated June 7, 1973).

On August 23, 1973 the district court disqualified plaintiffs' counsel, dismissed the action without prejudice, enjoined Goldberg from participating in any further prosecution of the claims asserted against Empire and enjoined both Goldberg and plaintiffs' counsel from disclosing confidential information regarding Empire, except to comply with rulings of the court on discovery proceedings or upon trial (Appendix A, pp. 8a-9a).

Both plaintiffs and their attorneys appealed from the district court's order. Goldberg was permitted to intervene as an additional appellant. Petitioners cross-appealed to the extent that the district court's order failed to enjoin the individual plaintiffs from disclosing information con-

cerning Empire which had been improperly obtained or from acting as class representatives in any subsequent action involving the claims asserted in this action.*

The court of appeals reversed the district court's dismissal of the action, reinstated plaintiffs' attorneys, dismissed petitioners' cross-appeal, but affirmed the district court's order to the limited extent that it enjoined Goldberg from acting as a party or as an attorney for a party with respect to the claims in issue or from further disclosing material information except on discovery or at trial.

The Reasons for Granting the Writ

The court of appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The decision of the court of appeals is in conflict with other of its own decisions.

The result reached below calls into question the basic fairness, and appearance of fairness, of securities class litigation in the federal courts and the extent to which, if at all, attorneys named as defendants in such cases continue to be subject to professional obligations of loyalty and confidentiality with respect to their former clients. The court of appeals has held, in substance, that in a secu-

* While the case was before the court of appeals, plaintiffs retained new counsel and commenced a second action in the district court on the basis of the identical claims asserted in this action. The second action is presently pending in the district court.

rities class action brought in a federal court, an attorney named as a co-defendant with his former client, notwithstanding the broad provisions of Canons 4 and 9 of the Code of Professional Responsibility, may attempt to extricate himself from the action by disclosing to the attorneys for the class all that he knows about his former client and the subject matter of the action; that he may do so unilaterally, without his former client's knowledge or consent and without the prior permission or supervision of the court before which the action is then pending; and that the attorneys for the class under such circumstances, knowing of the prior attorney-client relationship, do no wrong by accepting such disclosures and the proffered future cooperation of the defendant attorney in furthering the prosecution of the action against his former client.

In every meaningful sense, under the court's decision an adverse party may effectively strip the client of the protection of the attorney-client relationship and subject him to unsupervised disclosure of prejudicial information by the simple device of naming the client's lawyer as a co-defendant. This is precisely the result sanctioned under the unprecedented holding of the court of appeals. If permitted to stand, the decision will foster a drastic erosion of the attorney-client relationship and "[t]he stature of the [legal] profession and the courts, and the esteem in which they are held. . . ." (*Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 575 (2d Cir. 1973)).

Over the last year or so both the Chief Justice of the United States and the Chief Judge of the Second Circuit have stressed the importance of legal ethics and the appearance of propriety. Chief Justice Burger has stated:

> "Woven into the seamless fabric of effective advocacy, professional ethics and professional manners are no less important than technical skills" (Burger, *The Spe-*

cial Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227, 236 (1973)).

Chief Judge Kaufman has also emphasized that current assessments of ethical standards must be made within the context of impaired public confidence in the legal profession:

> "Lawyers like judges, must learn to avoid actual impropriety and the appearance of impropriety in the conduct of their lives. I therefore urge the Bar to tend to its own garden, at this time when confidence in our calling has been impaired. The public, in times of stress, has always looked to our independent Bar, and particularly the lawyers of the Second Circuit—so long considered the foremost in the nation—for guidance. The legal profession must live up to its own history of responsible leadership and service" (170 N.Y.L.J. at p. 5, col. 4 (December 7, 1973)).

In addition, since public confidence in the legal system is essential, ethical propriety and the fairness of judicial proceedings not only must be maintained, but must be maintained on such a level as to be beyond question and readily manifest to the lay public. Thus, in *Emle Industries, Inc.* v. *Patentex, Inc.*, *supra* at 571 the court stated:

> "Nowhere is Shakespeare's observation that 'there is nothing either good or bad but thinking makes it so,' more apt than in the realm of ethical considerations. It is for this reason that Canon 9 of the Code of Professional Responsibility cautions that 'A lawyer should avoid even the appearance of professional impropriety'. . . ."

See also *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 926 (2d Cir. 1954).

The already impaired public confidence in our legal system, we submit, can only be further impaired by conduct and procedures such as portrayed in this record. If a client who confides in an attorney is to be told that his lawyer, in defending against charges which may be levelled against him by plaintiffs' attorneys in a class action, may disclose information damaging to the client "[d]espite the breadth of paragraphs EC 4-4 and DR 4-101 (B)" (Appendix B, p. 18a)—unilaterally and without notice or supervision by the court—public confidence in the Bar, the loyalty of lawyers to their clients, the confidentiality of the attorney-client relationship and the fairness of federal court proceedings must inevitably suffer.

The traditional protections of the Code of Professional Responsibility are mere shadows if they must yield to a lawyer's concern over the prospect of defending litigation or the adverse notoriety occasioned "by the mere pendency" of such litigation (Appendix B, p. 19a). These concerns, the only justifications offered by the court of appeals for its decision, are the very concerns with which laymen have been required to live in the world of class action litigation. Public confidence in the system of justice cannot be promoted by holding that the Code of Professional Responsibility is to be abridged so that lawyers may be spared the very concerns which their own clients must endure.

The "self defense" theory upon which the court of appeals based its decision was never argued by appellants in the district court and was raised for the first time on appeal (See Appendix A). It was adopted by the court of appeals without citation of authority. It is also inconsistent with longstanding opinions of the American Bar Association's Committee on Professional Ethics construing

former Canon 37, a predecessor of DR 4-101(C), under which an attorney's right to make disclosures to defend himself against accusations of misconduct arises when such accusations are made *by the client*, not by third parties. See Opinions 19 and 202 of the American Bar Association's Committee on Professional Ethics (1957); see also footnote 19 to DR 4-101(C)(4) in the A.B.A. Code of Professional Responsibility, which sets forth references and quotations establishing that the "self defense" exception to an attorney's obligation of confidentiality is applicable only when the attorney is accused of misconduct by his client. As a leading writer in the field of legal ethics has stated:

> "*Canon 4 and its subjoined rules make no changes in settled principles of ethics involving the preservation of confidential clietal information.* These precepts have been traditional in the relationship of client and lawyer in the art of legal ethics, preserved by old Canons 6, 11 and 37. . . ." R. Wise, *Legal Ethics*, p. 65 (2d ed. 1970).

Furthermore, completely apart from any substantive interpretation of Canon 4, disclosures in a pending action cannot arbitrarily, unilaterally and secretly be made, as in the present case, and then later justified on the alleged ground that the information disclosed was not technically privileged. Such a procedure usurps the function of the court and destroys the fairness, and appearance of fairness, of judicial proceedings, by reducing what happens in court to post-mortem approval of clandestine *faits accomplis.**

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* As the district court properly observed, "discovery is conducted within the supervision of the court. No such safeguards were available at the meetings between plaintiffs' counsel and Goldberg" (Appendix A, pp. 7a-8a). The court of appeals did not address itself to this point in its decision.

No client, under such circumstances, can be expected to confide in a lawyer or to believe that claims against him are not being prosecuted on the basis of improperly disclosed evidence.

Little more than one year ago, in *Emle Industries, Inc.* v. *Patentex, Inc., supra*, the Second Circuit applied a strict prophylactic rule to uphold the high ethical standards of Canons 4 and 9 and thus "prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage." 478 F.2d at 571. The court stated that "[w]ithout strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would justifiably fear that information he reveals to his lawyer on one day may be used against him on the next. A lawyer's good faith, although essential in all his professional activity, is, nevertheless, an inadequate safeguard when standing alone." 478 F.2d at 570-71. See also *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp., supra; Doe* v. *A. Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd per curiam* sub nom. *Hall* v. *A. Corp.*, 453 F.2d 1375 (2d Cir. 1972).

In the present case, however, the court of appeals refused to apply this strict prophylactic rule on the ground that Goldberg, Empire's former attorney, "never sought to 'prosecute litigation'" against Empire "either as a party . . . or as counsel for a plaintiff party" (Appendix B, p. 20a). The court reasoned that Golberg "might be called as a witness for the plaintiffs but that role does not invest him with the intimacy with the prosecution of the litigation which must exist for the *Emle* presumption to attach" (*Ibid.*).

We believe the distinction relied on is without substance. Indeed, the facts of the present case are far more compell-

ing for application of the principle enunciated in *Emle* than the facts of *Emle* itself. In *Emle* there was no indication whatsoever that the client's former attorney had disclosed, or even considered disclosing, any information acquired during his representation of the former client. In marked contrast, Empire's former counsel, Goldberg, in seeking to extricate himself from this action, disclosed "all facts within his possession" (A. 34-35) to plaintiffs' attorneys—whom the district court found to be "willing, if not eager, listeners" (Appendix A, p. 6a).

If a client in the future is to be free from fear in his discussions with his attorney, if public confidence in the Bar and in judicial fairness requires protection against unsupervised disclosure of cliental information by attorneys seeking to extricate themselves from litigation, if the attorney-client relationship is to remain viable in the face of the expanding role of attorneys as defendants in securities class actions, then the decision of the court of appeals in this case warrants review by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

(Memorandum Decision of MacMahon, *D.J.*)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1940—LFM

DIETRICH MEYERHOFER *et al.*,

Plaintiffs,

—against—

EMPIRE FIRE AND MARINE INSURANCE COMPANY *et al.*,

Defendants.

MACMAHON, *District Judge*.

Plaintiffs move under Rule 56, Fed.R.Civ.P., and Civil Rule 11A of this court for an order declaring that this action be maintained as a class action. Invoking Canons 4 and 9 of the Code of Professional Responsibility and the supervisory power of this court, the individual defendants Empire Fire and Marine Insurance Company (Empire) and Sitomer, Sitomer & Porges (Sitomer firm) cross-move for an order disqualifying plaintiffs' attorneys from representing plaintiffs in this action or associating with any other attorney in the prosecution of this action; enjoining plaintiffs, their attorneys and Stuart Charles Goldberg from further disclosing confidential information regarding Empire; directing the Clerk of the court to seal that part of the file containing confidential information; dismissing this action without prejudice; and granting such other relief as the court may deem proper. We shall consider the cross-motion first.

Appendix A

Empire retained the Sitomer firm to draft a registration statement in connection with a public offering of Empire stock. Goldberg, a limited partner of the law firm from November 15, 1971 until January 21, 1973, was actively involved in the preparation of the statement or in the necessary background work, such as, reviewing the minutes of Empire. The registration statement for the Empire issue was dated May 31, 1972.

In January 1973, Goldberg became aware of what he felt were material omissions concerning certain compensation agreements between the Sitomer firm and Empire. Evidently, the possibility that these agreements would become public was the subject of much discussion within the Sitomer firm. Goldberg thought that full disclosure to the Securities and Exchange Commission (SEC) was proper and obligatory. He asked his personal attorney to contact Stanley Sporkin, Deputy Director of the SEC's Division of Enforcement, explain the nature of the problem and make known Goldberg's availability to meet with the SEC to discuss the problem.

A meeting between Goldberg and SEC representatives was arranged for Monday morning, January 22, 1973. The night before this meeting, Goldberg sent telegrams to two limited partners in the Sitomer firm advising them of his immediate resignation from the firm and of his meeting with the SEC "for the purpose of making full and complete disclosure regarding the activities of the firm in regards to securities practice."

During the next week, Goldberg discussed the firm's activities with respect to the Empire registration statement and also with respect to another registration statement which the firm had been preparing. He submitted a lengthy affidavit to the SEC outlining these activities on January 26, 1973. No member of the firm participated in or ap-

peared at these discussions notwithstanding their present claims that they intended to make full disclosure. The SEC has commenced an investigation of these transactions.

Empire filed its annual report with the SEC (Form 10k) on April 12, 1973. This report made public disclosure for the first time of the compensation agreements. The report was distributed to Empire's stockholders on or before April 30, 1973.

Plaintiffs filed their original complaint on May 2, 1973 asserting that the omission of the compensation agreements from the registration statement was a violation of the securities laws.[1] Service was made on that same day on the Sitomer firm and its general partners. Plaintiffs' counsel (counsel) telephoned Goldberg on May 3, 1973, informed him that an action had been commenced and that Goldberg was named as a defendant. Goldberg denied any wrongdoing and told counsel of his efforts to have the Sitomer firm make disclosure and of his own disclosure before the SEC. Counsel agreed that if Goldberg were not involved in the alleged omissions, they would move to drop Goldberg as a party defendant. Goldberg then asked if he could see a copy of the complaint without being served.

Counsel arranged to meet Goldberg in front of counsel's office building. At this meeting on May 3, 1973 coun-

[1] The X firm and the general partners have attempted to show that counsel for plaintiffs had become aware of the firm's predicament through discussion with the X firm concerning the renting of a part of the firm's office space by counsel for plaintiffs. They evidently are trying to posit some breach of confidence by counsel or by a third party who acted as intermediary in the renting discussion. This has caused counter-charges and replies. Although there are evidently questions of fact here, we do not feel that a hearing is necessary since resolution of these issues is not necessary to determine the cross-motion.

sel requested a copy of Goldberg's SEC affidavit but he refused to disclose it until he had spoken with his own attorney and with the SEC. After discussing the matter with his attorney, Goldberg arranged to meet counsel on May 7, 1973 at counsel's office. At this meeting, he again refused to show counsel his affidavit until he had spoken with the SEC. Counsel and Goldberg then called William P. Sullivan, Special Counsel at the SEC. Mr. Sullivan stated that the SEC had no objection to disclosure of the affidavit. Goldberg then gave counsel a copy. A discussion followed.

Subsequent to this meeting, counsel moved for an order dropping Goldberg as a named defendant. We granted that motion since Goldberg had not been served and since no prejudice would accrue to any other party. Defendants now assert that their cross-motion should be granted because counsel aided and abetted a disclosure of confidential information and because counsel have failed to avoid the appearance of impropriety, in violation of Canons 4 and 9 of the Code of Professional Responsibility.

It is the duty of the court to examine charges of unethical conduct and to supervise the conduct of its attorneys.[2] When considering such charges, courts may not rely upon the good faith of the attorneys involved, but rather must apply "a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage."[3]

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[2] *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Richardson* v. *Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3608 (U.S. May 14, 1973).

[3] *Emle Industries, Inc.* v. *Patentex, Inc.*, *supra*, 478 F.2d at 571.

Appendix A

Canon 4 provides that "a lawyer should preserve the confidences and secrets of a client." This obligation is broader than the evidentiary attorney-client privilege and "exists without regard to the nature or source of information or the fact that others share the knowledge."[4] Furthermore, the court does not stop to inquire whether any information which Goldberg or his firm may have disclosed to plaintiffs' counsel was in fact confidential, for such an inquiry would reveal the very confidences sought to be protected. All that need be shown, therefore, is that during the attorney-client relationship Goldberg had access to his client's information relevant to the issues here.[5]

Canon 9 provides that a "lawyer should avoid even the appearance of professional impropriety." Every effort must be made, therefore, to ensure not only that the actions of lawyers are proper but also that they appear to be so. The appearance of propriety may be as necessary as the fact.[6]

Goldberg had been actively involved in the preparation of Empire's registration statement. He inspected its minute books and before going to the SEC in January 1973 inspected Empire's file. There can be no question, therefore, that Goldberg had access to client material related to the issues here. Likewise, there can be no question that

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[4] Ethical Consideration 4-4. See *Doe* v. *A Corp.*, 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971), *aff'd per curiam*, 453 F.2d 1375 (2d Cir. 1972).

[5] *Emle Industries, Inc.* v. *Patentex, Inc.*, *supra*, 478 F.2d at 571; *Richardson* v. *Hamilton Int'l Corp.*, *supra*; *Empire Linotype School, Inc.* v. *United States*, 143 F. Supp. 627, 632 (S.D.N.Y. 1956); *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268, *motion to reargue denied*, 125 F. Supp. 233 (S.D.N.Y. 1953).

[6] *Emle Industries, Inc.* v. *Patentex, Inc.*, *supra*, 478 F.2d at 571.

he has associated with, and made disclosures to, the plaintiffs without the consent of Empire. The mere association compromises the confidences which Canon 4 seeks to protect. At the very least, when a former client is sued, he has a right to assume that his former attorneys will not voluntarily disclose what they know about the issues in litigation to the client's adversary or to his adversary's attorneys.[7] The fact that Goldberg no longer represented Empire, or even that plaintiffs had named him as a defendant, does not relieve him of his professional responsibility.[8]

Furthermore, association with the former client's adversary gives the appearance of impropriety. All other defendants were served; Goldberg, alone, among the named defendants was not served, and it was counsel for the plaintiffs who requested that Goldberg be dropped as a defendant. However innocent the association with the former client's adversary's counsel may have been, it clearly has the appearance of impropriety.

Counsel for the plaintiffs cannot disentangle themselves from the tainted association. They agreed to meet with Goldberg and were willing, if not eager, listeners to disclosures of confidences which they knew, or should have known, were protected by the Canons of Professional Responsibility. They, thus, not only encouraged but also participated in a violation of Canon 4 and Canon 9.

Plaintiffs argue, however, that the alleged omissions and misstatements by Empire constitute, if true, a continuing criminal and civil violation of the anti-fraud provisions of the securities laws and that, therefore, Goldberg was re-

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[7] Ethical Considerations 4-2 and 4-5.

[8] Ethical Consideration 4-6.

quired to reveal the information to the SEC by Disciplinary Rule 7-102(B)(1). That rule provides:

> "A lawyer who receives information clearly establishing that:
>
> (1) His client, has in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."

Goldberg disclosed the information to the SEC in January 1973, and in April of that year Empire disclosed the information in its annual report to stockholders which it filed with the SEC. The complaint here was thus filed on the basis of information already public. Disciplinary Rule 7-102(B)(1) requires the lawyer to reveal the fraud only if the client refuses to do so. Since the client had already revealed the omission to its stockholders and to the public, via the SEC, Goldberg had no further obligation under Disciplinary Rule 7-102(B)(1) to reveal the information or to discuss the matter with plaintiffs' counsel.[9]

Plaintiffs further argue that Goldberg's disclosures could have been compelled through the discovery process. The argument is both immaterial and premature. As we have shown, the issues raised here are broader than the attorney-client privilege and whether the disclosure of information will offend that privilege must await concrete situations during discovery or trial. Moreover, discovery is conducted within the supervision of the court. No such

[9] We do not consider the propriety of Goldberg's disclosures to the SEC.

safeguards were available at the meetings between plaintiffs' counsel and Goldberg.

Plaintiffs also raise other arguments based on the attorney-client privilege. They attempt to show that the attorney-client privilege does not apply and therefore that there was no bar to Goldberg's meeting with plaintiffs' counsel. These arguments are inapposite, since, as we have seen, we are concerned with the broader obligations of Canons 4 and 9. We hold only that, under the circumstances shown here, the meetings between Goldberg and counsel were violative of Canons 4 and 9. We need not and do not reach any situation which may later arise where the attorney-client privilege may be in issue.

We now consider the scope of the relief. The circumstances of this case have put all parties and counsel in an unusual situation. The questions presented are close. Both Goldberg and counsel consulted as to the propriety of their meetings and the disclosures, and we think they acted in good faith. However, in keeping with the "strict prophylactic rule" of *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2 Cir. 1973), to protect confidences and to ensure propriety and the appearance of propriety on the part of the bar, we must prevent such conduct as that shown here.

Accordingly, counsel for plaintiffs and Goldberg are enjoined and barred from acting as counsel or participating in any way with counsel for the plaintiffs in this action or in any future action against Empire involving the same transactions, occurrences, events, allegations, facts or issues, and they are further enjoined from disclosing confidential information regarding Empire to others except to comply with rulings of the court on discovery proceedings or upon trial. All other injunctive relief requested is denied.

Appendix A

The affidavits submitted to us *in camera*, specifically, Goldberg's affidavit of June 21, 1973 and Goldberg's affidavit of January 26, 1973 prepared for the SEC, shall be made a part of the record and sealed by the Clerk of the court.

In light of the foregoing, it becomes necessary to dismiss the complaint and this action without prejudice. Since we have dismissed the action, there is no need to consider plaintiffs' motion for an order determining this to be a class action.

So ordered.

Dated: New York, N. Y.
August 23, 1973

/s/ Lloyd F. MacMahon
Lloyd F. MacMahon
United States District Judge

Appendix B

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 512-14—September Term, 1973.

(Argued January 16, 1974 Decided June 10, 1974.)

Docket Nos. 73-2340, 73-2443, 73-2501

DIETRICH MEYERHOFER and HERBERT FEDERMAN,

Appellants-Appellees,

BERNSON, HOENIGER, FREITAG & ABBEY,

Appellants,

STUART CHARLES GOLDBERG,

Intervenor-Appellant,

v.

EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS, YALE J. KAPLAN, ROBERT A. PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, L. C. SWICK, M. M. JENNINGS, JR., SITOMER, SITOMER & PORGES, ALVIN L. SITOMER, STEPHAN J. SITOMER and ROBERT E. PORGES,

Appellees-Appellants,

FAULKNER, DAWKINS & SULLIVAN SECURITIES CORP.,

Defendant.

Before:

MOORE, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from a memorandum decision and order of the United States District Court for the Southern District of

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New York, Hon. Lloyd F. MacMahon, *Judge*, (a) dismissing plaintiffs' action without prejudice, (b) enjoining and disqualifying plaintiffs' counsel and Stuart Charles Goldberg from acting as attorneys for plaintiffs in any action against the Empire Fire and Marine Insurance Company arising out of the same events, and (c) enjoining plaintiffs' counsel and Stuart Charles Goldberg from disclosing confidential information to others; also, cross-appeals seeking disqualification of plaintiffs.

Order reversed in part and affirmed in part; cross-appeals dismissed.

ROGERS M. DOERING, New York, N. Y. (Simpson, Thacher & Bartlett, New York, N. Y., and Cynthia M. Cohen, of counsel), *for appellants and cross-appellees Dietrich Meyerhofer, Herbert Federman and Bernson, Hoeniger, Freitag & Abbey.*

LAWRENCE M. MCKENNA, New York, N. Y. (Wormser, Kiely, Allesandroni, Mahoney & McCann, New York, N. Y., of counsel), *for intervenor-appellant Stuart Charles Goldberg.*

ANTHONY L. TERSIGNI, New York, N. Y. (Aranow, Brodsky, Bohlinger, Benetar, Einhorn & Dann, New York, N. Y., George Berlstein and Kathryn E. Zenoff, of counsel), *for appellees and cross-appellants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, L. C. Swick and M. M. Jennings, Jr.*

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ROBERT E. MESHEL, New York, N. Y. (D'Amato, Costello & Shea, New York, N. Y., George G. D'Amato, of counsel), *for appellees and cross-appellants Sitomer, Sitomer & Porges, Alvin L. Sitomer, Stephen J. Sitomer and Robert E. Porges.*

THE SECURITIES AND EXCHANGE COMMISSION, Washington, D.C. (Lawrence E. Nerheim, General Counsel, Theodore Sonde, Assistant General Counsel and Theodore L. Freedman, Attorney), *as amicus curiae.*

MOORE, *Circuit Judge:*

This is an appeal by Dietrich Meyerhofer and Herbert Federman, plaintiffs, and their counsel, Bernson, Hoeniger, Freitag & Abbey, from an order of the United States District Court for the Southern District of New York, dated August 23, 1973, (a) dismissing without prejudice plaintiffs' action against defendants, (b) enjoining and disqualifying plaintiffs' counsel, Bernson, Hoeniger, Freitag & Abbey, and Stuart Charles Goldberg from acting as attorneys for plaintiffs in this action or in any future action against defendant Empire Fire and Marine Insurance Company (Empire) involving the same transactions, occurrences, events, allegations, facts or issues, and (c) enjoining Bernson, Hoeniger, Freitag & Abbey and Stuart Charles Goldberg from disclosing confidential information regarding Empire to others. Intervenor Stuart Charles Goldberg also appeals from said order.

Defendants Empire, Gross, Kaplan, Phillips, Kratky, Lalich, Swick, Jennings, Jr., Sitomer, Sitomer & Porges, A. L. Sitomer, S. J. Sitomer and Robert E. Porges cross-appeal from the order insofar as that order failed to dis-

qualify plaintiffs, Meyerhofer and Federman, from acting as class representatives of those who purchased the common stock of Empire, or to enjoin them from disclosing confidential information learned either from Bernson, Hoeniger, Freitag & Abbey or from Stuart Charles Goldberg.

The full import of the problems and issues presented on this appeal cannot be appreciated and analyzed without an initial statement of the facts out of which they arise.

Empire Fire and Marine Insurance Company on May 31, 1972, made a public offering of 500,000 shares of its stock, pursuant to a registration statement filed with the Securities and Exchange Commission (SEC) on March 28, 1972. The stock was offered at $16 a share. Empire's attorney on the issue was the firm of Sitomer, Sitomer & Porges. Stuart Charles Goldberg was an attorney in the firm and had done some work on the issue.

Plaintiff Meyerhofer, on or about January 11, 1973, purchased 100 shares of Empire stock at $17 a share. He alleges that as of June 5, 1973, the market price of his stock was only $7 a share—hence, he has sustained an unrealized loss of $1,000. Am'd Compl. ¶9a. Plaintiff Federman, on or about May 31, 1972, purchased 200 shares at $16 a share, 100 of which he sold for $1,363, sustaining a loss of some $237 on the stock sold and an unrealized loss of $900 on the stock retained.

On May 2, 1973, plaintiffs, represented by the firm of Bernson, Hoeniger, Freitag & Abbey (the Bernson firm), on behalf of themselves and all other purchasers of Empire common stock, brought this action alleging that the registration statement and the prospectus under which the Empire stock had been issued were materially false and misleading. Thereafter, an amended complaint, dated June 5, 1973, was served. The legal theories in both were iden-

tical, namely, violations of various sections of the Securities Act of 1933, the Securities Exchange Act of 1934, Rule 10b-5, and common law negligence, fraud and deceit. Damages for all members of the class or rescission were alternatively sought.

The lawsuit was apparently inspired by a Form 10-K which Empire filed with the SEC on or about April 12, 1973. This Form revealed that "The Registration Statement under the Securities Act of 1933 with respect to the public offering of the 500,000 shares of Common Stock did not disclose the proposed $200,000 payment to the law firm as well as certain other features of the compensation arrangements between the Company [Empire] and such law firm [defendant Sitomer, Sitomer and Porges]." Later that month Empire disseminated to its shareholders a proxy statement and annual report making similar disclosures.

The defendants named were Empire, officers and directors of Empire, the Sitomer firm and its three partners, A. L. Sitomer, S. J. Sitomer and R. E. Porges, Faulkner, Dawkins & Sullivan Securities Corp., the managing underwriter, Stuart Charles Goldberg, originally alleged to have been a partner of the Sitomer firm, and certain selling stockholders of Empire shares.

On May 2, 1973, the complaint was served on the Sitomer defendants and Faulkner. No service was made on Goldberg who was then no longer associated with the Sitomer firm. However, he was advised by telephone that he had been made a defendant. Goldberg inquired of the Bernson firm as to the nature of the charges against him and was informed generally as to the substance of the complaint and in particular the lack of disclosure of the finder's fee arrangement. Thus informed, Goldberg requested an opportunity to prove his non-involvement in any such arrangement and his lack of knowledge thereof. At this

stage there was unfolded the series of events which ultimately resulted in the motion and order thereon now before us on appeal.

Goldberg, after his graduation from Law School in 1966, had rather specialized experience in the securities field and had published various books and treatises on related subjects. He became associated with the Sitomer firm in November 1971. While there Goldberg worked on phases of various registration statements including Empire, although another associate was responsible for the Empire registration statement and prospectus. However, Goldberg expressed concern over what he regarded as excessive fees, the nondisclosure or inadequate disclosure thereof, and the extent to which they might include a "finder's fee," both as to Empire and other issues.

The Empire registration became effective on May 31, 1972. The excessive fee question had not been put to rest in Goldberg's mind because in middle January 1973 it arose in connection with another registration (referred to as "Glacier"). Goldberg had worked on Glacier. Little purpose will be served by detailing the events during the critical period January 18 to 22, 1973, in which Goldberg and the Sitomer partners were debating the fee disclosure problem. In summary, Goldberg insisted on a full and complete disclosure of fees in the Empire and Glacier offerings. The Sitomer partners apparently disagreed and Goldberg resigned from the firm on January 22, 1973.

On January 22, 1973, Goldberg appeared before the SEC and placed before it information subsequently embodied in his affidavit dated January 26, 1973, which becomes crucial to the issues now to be considered.

Some three months later, upon being informed that he was to be included as a defendant in the impending action, Goldberg asked the Bernson firm for an opportunity to demonstrate that he had been unaware of the finder's

fee arrangement which, he said, Empire and the Sitomer firm had concealed from him all along. Goldberg met with members of the Bernson firm on at least two occasions. After consulting his own attorney, as well as William P. Sullivan, Special Counsel with the Securities and Exchange Commission, Division of Enforcement, Goldberg gave plaintiffs' counsel a copy of the January 26th affidavit which he had authored more than three months earlier. He hoped that it would verify his nonparticipation in the finder's fee omission and convince the Bernson firm that he should not be a defendant. The Bernson firm was satisfied with Goldberg's explanations and, upon their motion, granted by the court, he was dropped as a defendant. After receiving Goldberg's affidavit, the Bernson firm amended plaintiffs' complaint. The amendments added more specific facts but did not change the theory or substance of the original complaint.

By motion dated June 7, 1973, the remaining defendants moved "pursuant to Canons 4 and 9 of the Code of Professional Responsibility, the Disciplinary Rules and Ethical Considerations applicable thereto, and the supervisory power of this Court" for the order of disqualification now on appeal.

By memorandum decision and order, the District Court ordered that the Bernson firm and Goldberg be barred from acting as counsel or participating with counsel for plaintiffs in this or any future action against Empire involving the transactions placed in issue in this lawsuit and from disclosing confidential information to others.

The complaint was dismissed without prejudice. The basis for the Court's decision is the premise that Goldberg had obtained confidential information from his client Empire which, in breach of relevant ethical canons, he revealed to plaintiffs' attorneys in their suit against Empire. The

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Court said its decision was compelled by "the broader obligations of Canons 4 and 9." [1]

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1 Code of Professional Responsibility

Canon 4

A Lawyer Should Preserve the Confidence and Secrets of a Client

Ethical Considerations

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.

• • • •

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. The ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege . . . .

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes . . .

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment . . . .

Disciplinary Rules

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

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There is no proof—not even a suggestion—that Goldberg had revealed any information, confidential or otherwise, that might have caused the instigation of the suit. To the contrary, it was not until after the suit was commenced that Goldberg learned that he was in jeopardy. The District Court recognized that the complaint had been based on Empire's—not Goldberg's—disclosures, but concluded because of this that Goldberg was under no further obligation "to reveal the information or to discuss the matter with plaintiffs' counsel."

Despite the breadth of paragraphs EC4-4 and DR4-101 (B), DR4-101 (C) recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against "an accusation of wrongful conduct." This is exactly what Goldberg had to face when, in their original complaint, plaintiffs named him as a defendant who wilfully violated the securities laws.

The charge, of knowing participation in the filing of a false and misleading registration statement, was a serious one. The complaint alleged violation of criminal statutes

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Canon 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Ethical Considerations

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession: to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

and civil liability computable at over four million dollars. The cost in money of simply defending such an action might be very substantial. The damage to his professional reputation which might be occasioned by the mere pendency of such a charge was an even greater cause for concern.

Under these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence.

The problem arises from the fact that the method Goldberg used to accomplish this was to deliver to Mr. Abbey, a member of the Bernson firm, the thirty page affidavit, accompanied by sixteen exhibits, which he had submitted to the SEC. This document not only went into extensive detail concerning Goldberg's efforts to cause the Sitomer firm to rectify the nondisclosure with respect to Empire but even more extensive detail concerning how these efforts had been precipitated by counsel for the underwriters having come upon evidence showing that a similar nondisclosure was contemplated with respect to Glacier and their insistence that full corrective measures should be taken. Although Goldberg's description reflected seriously on his employer, the Sitomer firm and, also, in at least some degree, on Glacier, he was clearly in a situation of some urgency. Moreover, before he turned over the affidavit, he consulted both his own attorney and a distinguished practitioner of securities law, and he and Abbey made a joint telephone call to Mr. Sullivan of the SEC. Moreover, it is not clear that, in the context of this case, Canon 4 applies to anything except information gained from Empire. Finally, because of Goldberg's apparent intimacy with the offering, the most effective way for him to substantiate his story was for him to disclose the SEC affidavit. It was the fact that he had written such an affidavit at an

earlier date which demonstrated that his story was not simply fabricated in response to plaintiffs' complaint.

The District Court held: "All that need be shown . . . is that during the attorney-client relationship Goldberg had access to his client's information relevant to the issues here." *See Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). However, the irrebuttable presumption of *Emle Industries* has no application to the instant circumstances because Goldberg never sought to "prosecute litigation," either as a party, *compare Richardson* v. *Hamilton International Corp.*, 42 U.S.L.W. 2519 (E.D.Pa. Mar. 8, 1974), or as counsel for a plaintiff party. *Compare T.C. Theatre Corporation* v. *Warner Brothers Pictures*, 113 F.Supp. 265 (S.D.N.Y. 1953). At most the record discloses that Goldberg might be called as a witness for the plaintiffs but that role does not invest him with the intimacy with the prosecution of the litigation which must exist for the *Emle* presumption to attach.

In addition to finding that Goldberg had violated Canon 4, the District Court found that the relationship between Goldberg and the Bernson firm violated Canon 9 of the Code of Professional Responsibility which provides that:

> EC 9-6 Every lawyer [must] strive to avoid not only professional impropriety but also the appearance of impropriety.

The District Court reasoned that even though there was no evidence of bad faith on the part of either Goldberg or the Bernson firm, a shallow reading of the facts might lead a casual observer to conclude that there was an aura of complicity about their relationship. However, this provision should not be read so broadly as to eviscerate the right of self-defense conferred by DR4-101 (C)(4).

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Nevertheless, *Emle Industries, Inc.* v. *Patentex, Inc.*, *supra*, requires that a strict prophylactic rule be applied in these cases to ensure that a lawyer avoids representation of a party in a suit against a former client where there may be the appearance of a possible violation of confidence. To the extent that the District Court's order prohibits Goldberg from *representing* the interests of these or any other plaintiffs in this or similar actions, we affirm that order. We also affirm so much of the District Court's order as enjoins Goldberg from disclosing material information except on discovery or at trial.

The burden of the District Court's order did not fall most harshly on Goldberg; rather its greatest impact has been felt by Bernson, Hoeniger, Freitag & Abbey, plaintiffs' counsel, which was disqualified from participation in the case. The District Court based its holding, not on the fact that the Bernson firm showed bad faith when it received Goldberg's affidavit, but rather on the fact that it was involved in a tainted association with Goldberg because his disclosures to them inadvertently violated Canons 4 and 9 of the Code of Professional Responsibility. Because there are no violations of either of these Canons in this case, we can find no basis to hold that the relationship between Goldberg and the Bernson firm was tainted. The District Court was apparently unpersuaded by appellees' salvo of innuendo to the effect that Goldberg "struck a deal" with the Bernson firm or tried to do more than prove his innocence to them. Since its relationship with Goldberg was not tainted by violations of the Code of Professional Responsibility, there appears to be no warrant for its disqualification from participation in either this or similar actions. *A fortiori* there was no sound basis for disqualifying plaintiffs or dismissing the complaint.

Order dismissing action without prejudice and enjoining Bernson, Hoeniger, Freitag & Abbey from acting as coun-

sel for plaintiffs herein reversed. Upon cross-appeal by Empire, Gross, Kaplan, Phillips, Kratky, Lalich, Swick and Jennings, Jr., and cross-appeal by Sitomer, Sitomer and Porges, A. L. Sitomer, S. J. Sitomer and R. E. Porges insofar as said orders failed to enjoin plaintiffs from disclosing confidential information regarding Empire and to disqualify plaintiffs from representing themselves or a similar class of Empire stockholders, appeals dismissed. To the extent that the orders appealed from prohibit Goldberg from acting as a party or as an attorney for a party in any action arising out of the facts herein alleged, or from disclosing material information except on discovery or at trial, they are affirmed.

Appendix C

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of June one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE
HON. HENRY J. FRIENDLY
HON. ROBERT P. ANDERSON

Circuit Judges,

73-2340, 73-2443, 73-2501

DIETRICH MEYERHOFER and HERBERT FEDERMAN, suing on behalf of themselves and all other purchasers of the common stock of Empire Fire and Marine Insurance Company similarly situated,

Plaintiffs-Appellants,

BERNSON, HOFNIGER, FREITAG and ABBEY,

Appellants,

v.

EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS, YALE J. KAPLAN, ROBERT A. PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, LESTER C. SWICK, M. M. JEN-

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NINGS, JR., STUART GOLDBERG, SITOMER, SITOMER & PORGES, ALVIN L. SITOMER, STEPHAN J. SITOMER, ROBERT E. PORGES and FAULKNER, DAWKINS & SULLIVAN SECURITIES CORP.,

Defendants-Appellees-Appellants,

STUART CHARLES GOLDBERG,

Intervenor-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in part and affirmed in part and that the cross-appeals be and they hereby are dismissed in accordance with the opinion of this court with costs to be taxed against the defendants-appellants and intervenor appellant.

A. DANIEL FUSARO,
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

Appendix D

(Order Staying Mandate)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of July, one thousand nine hundred and seventy-four.

DIETRICH MEYERHOFER and HERBERT FEDERMAN, suing on behalf of themselves and all other purchasers of the common stock of Empire Fire and Marine Insurance Company similarly situated,

Plaintiffs-Appellants,

BERNSON, HOENIGER, FREITAG and ABBEY,

Appellants,

v.

EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS, YALE J. KAPLAN, ROBERT A. PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, LESTER C. SWICK, M. M. JENNINGS, JR., STUART GOLDBERG, SITOMER, SITOMER & ROGERS [sic], *et al.,*

Defendants-Appellees-Appellants,

STUART CHARLES GOLDBERG,

Intervenor-Appellant.

Appendix D

It is hereby ordered that the motion made herein by counsel for the appellees and cross appellants Empire Fire and Marine Insurance Company by notice of motion dated June 24, 1974 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, in the event the pending petition for rehearing and rehearing en banc is denied.

Granted.

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ HENRY J. FRIENDLY
Henry J. Friendly

/s/ ROBERT P. ANDERSON
Robert P. Anderson

Circuit Judges

Appendix E

(Order Denying Rehearing)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of August, one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
Circuit Judges.

73-2340, 73-2443, 73-2501

DIETRICH MEYERHOFER and HERBERT FEDERMAN, suing on behalf of themselves and all other purchasers of the common stock of Empire Fire and Marine Insurance Company similarly situated,

Plaintiffs-Appellants,

BERNSON, HOENIGER, FREITAG and ABBEY,

Appellants,

v.

EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS, YALE J. KAPLAN, ROBERT A. PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, LESTER C. SWICK, M. M. JEN-

Appendix E

NINGS, JR., STUART GOLDBERG, SITOMER, SITOMER & PORGES, ALVIN L. SITOMER, STEPHAN J. SITOMER, ROBERT E. PORGES and FAULKNER, DAWKINS & SULLIVAN SECURITIES CORP.,

Defendants-Appellees-Appellants,

STUART CHARLES GOLDBERG,

Intervenor-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellees and cross-appellants Empire Fire and Marine Insurance Co., Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, L. C. Swick & M. M. Jennings Jr. Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO,
Clerk

By: /s/ VINCENT A. CARLIN
Chief Deputy Clerk

Appendix F

(Order Denying Petition for En Banc Rehearing)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of August, one thousand nine hundred and seventy-four.

73-2340, 73-2443, 73-2501

DIETRICH MEYERHOFER and HERBERT FEDERMAN, suing on behalf of themselves and all other purchasers of the common stock of Empire Fire and Marine Insurance Company similarly situated,

Plaintiffs-Appellants,

BERNSON, HOENIGER, FREITAG and ABBEY,

Appellants,

v.

EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS, YALE J. KAPLAN, ROBERT A. PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, LESTER C. SWICK, M. M. JENNINGS, JR., STUART GOLDBERG, SITOMER, SITOMER & PORGES, ALVIN L. SITOMER, STEPHAN J. SITOMER, ROBERT E. PORGES and FAULKNER, DAWKINS & SULLIVAN SECURITIES CORP.,

Defendants-Appellees-Appellants,

STUART CHARLES GOLDBERG,

Intervenor-Appellant.

Appendix F

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees and cross-appellants Empire Fire and Marine Insurance Company, Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, L. C. Swick and M. M. Jennings, Jr., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion, upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

/s/ Walter R. Mansfield
Walter R. Mansfield
Acting Chief Judge

Appendix G

(Code of Professional Responsibility)

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

Ethical Considerations

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.

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EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege. . . .

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. . . .

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. . . .

Disciplinary Rules

DR 4-101 Preservation of Confidences and Secrets of a Client.

Appendix G

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Canon 7

A Lawyer Should Represent A Client Zealously Within the Bounds of the Law

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

Appendix G

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

Canon 9

A Lawyer Shoud Avoid Even the Appearance of Professional Impropriety

Ethical Considerations

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Respon-

sibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

(Canons of Professional Ethics)

Canon 37

Confidences of a Client

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.